APPENDIX B
Adoption by Reference

INTRODUCTION

A standard drafting technique is to adopt provisions from another statute or material from an external source. Adopting material by reference has the advantage of eliminating verbiage. See 82 C.J.S. Statutes s. 71. It also promotes uniformity in the statutes, especially when proceedings and penalty provisions are adopted. Finally, the material adopted may have been interpreted by a court and defined by continued use.

On the other hand, adoption by reference has several drawbacks. If the adopted material is subsequently changed, it is unclear whether the statute incorporating the material is similarly changed. For example, s. 36.54 (2) (a) 1., defines a "corporation" to mean a nonstock corporation organized under ch. 181, stats. How does future amendment, creation, or repeal of a part of ch. 181, stats., affect s. 36.54 (2) (a) 1.? Does "nonprofit−sharing corporation" mean a corporation organized under the old law or under the new law?

A second problem concerns adopting external material by reference, such as federal statutes or regulations, rules or laws of other states, municipal ordinances, and private codes. In these cases the legislature incorporates material it did not write. If the legislature enacts the statute pending the writing of the incorporated material, or if the incorporated statute provides for adoption of future changes to the incorporated material, the legislature may be unconstitutionally delegating its law−making power. See 16 C.J.S. Const. Law 138, 16 Am Jur 2nd 343, 50 OAG 107 (1961), 66 OAG 331 (1977), and 68 OAG 9 (1979). For cases holding the opposite, see *People ex rel. Pratt v. Goldfogle*, 151 NE 452 (NY 1926) and *Commonwealth v. Goldfogle*, 119 A. 551 (PA 1923). (Also note that New York has passed a constitutional amendment specifically authorizing such an incorporation.) Read "Is Referential Legislation Worthwhile?" 25 Minn. L.R. 261 (1941), extracts reprinted in *Sutherland Stat Const* (6th Ed), s. 32A:15.

To clarify judicial construction of incorporated provisions, this appendix deals separately with the adoption of a statute by reference and with the adoption of material from an external source by reference.

ADOPTING A STATE STATUTE BY REFERENCE

If one Wisconsin statute refers to another Wisconsin statute, the problem of improper delegation does not arise because the legislature creates both laws and therefore does not delegate its law−making power to another entity. The problem presented is the correct construction of the adopting statute.

A. The Basic Rule.

When one statute adopts another, either by numerical reference or by description of the adopted statute, the adopting statute is treated as if the words of the adopted statute were written into the adopting statute but, under the basic rule, no changes to the adopted statute affect the meaning of the adopting statute. Even if the adopted statute is repealed, the reference in the adopting statute retains its vitality. Anno., 168 A.L.R. 627, 628. This strict interpretation of the adopting statute, which incorporates no subsequent changes to the adopted statute, has been embraced in all situations in Great Britain

and is commonly called the English Rule. Read *Sutherland Stat Const* (6th Ed), Vol. IA, p. 964.

Wisconsin adopted the English Rule in *Sika v. The Chicago and North−western Railway Company*, 21 Wis. 370, 371 (1867), overruled on other grounds by *Curry v. Chicago & Northwestern Railway Co.*, 43 Wis. 665, 681 (1878), where the court held: "A statute which refers to and adopts the provisions of another statute, is not repealed by the subsequent repeal of the statute adopted." *See Sutherland Stat Const* (6th Ed), s. 23.33. In *State v. Lamping*, 36 Wis. 2d 328 (1967), the court restated its position in a case involving a defendant who had deposited fill in a lake without obtaining a permit. In determining whether it had jurisdiction to decide the case, the court referred to s. 30.03 (4) (a), stats., which adopted s. 111.07 (7), stats., by reference, and stated: "The effect of such specific reference is the same as if the incorporated section was set forth verbatim and at length therein." *Id.* at 336.

B. Problems Associated with the Basic Rule.

The basic rule that the adopted statute is frozen in the adopting statute so that later changes to the adopted statute have no effect on the adopting statute reduces the efficiency of the legislature. Frequently, a requester intends that the adopting statute be continually updated by incorporating all future amendments to the adopted statute. This is especially true if the adopted statute deals only with procedural matters; the basic rule would hinder uniformity in procedure unless all adopting statutes were amended every time an adopted statute was changed. For this reason, courts have moved from the English Rule to an "American Rule." Note: 1950 Wis. L.R. 726. The American Rule presumes that an adopting statute is treated separately from the adopted statute, unless the legislative intent rebuts the presumption. If the legislature so intends, the court will construe the adopting statute to incorporate all later changes of the adopted statute.

C. Determining Legislative Intent.

A law that explicitly states the proper construction of statutory references is the most persuasive method of signifying legislative intent. In 1979, the Wisconsin legislature created s. 990.001 (5) (b), stats., as a rule of statutory construction covering adoption of statutes. Section 990.001 (5) (b), stats., provides that any reference to a decimal−numbered statute is to the current text of the adopted statute, including all amendments to the adopted statute. Section 990.001 (5) (b), stats., states:

> 990.001 (5) (b) When a decimal−numbered statute of this state contains a reference to another decimal−numbered statute of this state, the reference is to the current text of the statute referenced and includes any change that has been inserted into and any interpretation or construction that has been adopted with respect to the referenced statute since the reference was first incorporated into the statute, whether or not the referenced statute is a general, specific, substantive or procedural statute. When a decimal−numbered statute refers to another decimal−numbered statute in a specific prior edition of the Wisconsin statutes, the reference does not include subsequent changes to the statute referenced.

Hence, it is not necessary to include in a draft an explicit statement construing a statutory reference, unless the requester's intent is to freeze the adopted statute and incorporate no later changes. If that is the intent, specify the edition of the Wisconsin statutes from which the adopted statute is drawn, using, for example, "s. 295.13, 1995 stats."

Before the creation of s. 990.001 (5) (b), stats., the Wisconsin court haphazardly construed adoptions by reference. The court looked to the type of reference in the adopting statute to aid in its construction. The court treated a specific reference to an adopted statute, by statute number or by description, as a verbatim transcription unaffected by later changes to the adopted statute. On the other hand, the court inferred from a general reference to the body of law dealing with the subject of the adopted statute that the legislature intended to incorporate all later changes to the adopted statute into the adopting statute, including repeal of the adopted statute. G*eorge Williams College v. Williams Bay*, 242 Wis. 311, 316 (1943); *Union Ceme-*

tery v. Milwaukee, 13 Wis. 2d 64, 68−9 (1961); *Allison v. Ticor Title Insurance Co.*, 979 F. 2d 1187, 1201−03 (7th Cir. 1992); Anno., 168 A.L.R. 627, 628.

The Wisconsin court did not adhere strictly to the dichotomy between general and specific references. The court was willing to hedge its bets, seeking to transform specific references to an adopted statute into general references and vice versa to accomplish its purpose of determining legislative intent. *See Gilson Bros. Co. v. Worden−Allen Co.*, 220 Wis. 347, 352 (1936). The existence of s. 990.001 (5) (b), stats., ends the confusion surrounding this aspect of statutory construction if the adopted law is a decimal−numbered Wisconsin statute. See *State v. Christensen,* 110 Wis. 2d 538, 544−47 (1983) in which the court applied s. 990.001 (5) (b), stats., rejecting the old rule of *Union Cemetery* in a case involving a reference to a statute that had been repealed. If the reference is to a described federal act, however, *Union Cemetery* may still apply. See *Dane County Hospital & Home v. LIRC,* 125 Wis. 2d 308, 323−24 (Ct. App. 1985).

INCORPORATING MATERIAL FROM EXTERNAL SOURCES

A. The Problem: Improper Delegation of Law−Making Power.

Statutes not only refer to other statutes, but also incorporate material from external sources such as federal statutes or regulations. If the court finds that the legislature incorporated external material into a statute without incorporating later changes, a court has no grounds to strike down the law as an improper delegation of law−making power. The legislature theoretically has examined all relevant external material and passed judgment on its value. Read *Sutherland Stat Const* (6th Ed), Vol. IA, pp. 969−970. But if a court interprets a statute that incorporates external material as incorporating later changes in the material, a new question arises: has the legislature unconstitutionally delegated its legislative power to make laws by allowing the external source to dictate additions to the statutes?

Article IV, section 1, of the constitution provides: "The legislative power shall be vested in a senate and assembly." If the adopting statute seeks to incorporate external material yet to be created or external material including any later changes, the statute may be defective as an improper delegation.

B. Valid Delegation of Nonlegislative Power.

1. Delegation of fact−finding authority.

If a court cannot limit a statute adopting external material to incorporate only the material existing when the statute is adopted, the court will determine whether the legislature is delegating a law−making power or a fact−finding power. In *State v. Wakeen,* 263 Wis. 401 (1953) the legislature delegated to the federal government the power to define "drug." The defendant was prosecuted for the unlawful sale of drugs. Section 151.06 (1), 1951 stats., defined "drug" to mean articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, "or any supplement to any of them."

The defendant challenged this as an unconstitutional delegation of law−making power. The court found that the delegation was valid, despite the fact that criminal penalties attached, because the law depended only upon a determination of facts. The court explained that legislation must adapt to a host of complex conditions with which the legislature cannot deal directly. The court cited, in illustration, the fact that the licensing of members of professions depends on graduation from approved schools, an external condition subject to change without direct legislative oversight. *Id.* at 408−09.

For a contemporary illustration of the holding in *Wakeen,* note the incorporation of federal regulations throughout ch. 961, stats., the Uniform Controlled Substances Act. This chapter lists drugs in

five schedules with varying restrictions on use; each schedule states that the listing for any specific drug must be disregarded if excepted under federal regulations. *See* s. 961.14 (2) (intro.), stats., as well as other subsections in Schedules I to V, ss. 961.14 to 961.22, stats.

The incorporation of federal regulations and all future changes to the regulations is based on two premises. First, statutes are written in recognition of the Supremacy Clause, in article VI of the U.S. Constitution, which applies to the findings of Congress expressed in 21 USC 801 (3) to (6) that the federal Uniform Controlled Substances Act controls both interstate and intrastate commerce. Second, the state legislature's delegation of the power to define "drug" to federal agencies is a delegation of fact−finding powers, which *Wakeen* specifically validates.

In *Williams v. Hoffmann*, 66 Wis. 2d 145, 155−56 (1974), the supreme court determined that the legislature had validly incorporated the laws of other states and countries when it enacted the Uniform Anatomical Gift Act, s. 155.06, 1973 stats. Section 155.06 (7) (c), stats., provided:

> 155.06 (7) (c) A person who acts in good faith in accord with the terms of this section or with the anatomical gift laws of another state (or a foreign country) is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his [sic] act.

The court in *Williams* upheld this provision on the grounds that the legislature had delegated no law−making authority but rather recognized the laws of other jurisdictions as they apply to those jurisdictions. *Id.* at 155−56. The Uniform Anatomical Gift Act is now s. 157.07, stats.

The court relied upon *Wakeen* in *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32 (1978). In *Niagara of Wis. Paper Corp.*, two paper companies challenged the conditions of their pollutant discharge permits, issued in 1974 and scheduled to expire in 1978. DNR had promulgated rules prescribing the best practical control technology (BPTs) to be used. Section 147.021, 1977 stats., required that state standards not be more restrictive than federal standards. In 1974, the environmental protection agency (EPA) had published only interim guidelines for BPTs, on which DNR based its rules. In 1977, the EPA published less restrictive final regulations. The paper companies sought to have their permits changed to comply with the federal regulations. The circuit court agreed with the paper companies, and DNR challenged this interpretation of s. 147.021, 1977 stats., as causing an improper delegation in violation of article IV, section 1, of the constitution.

The court, citing *Wakeen*, held that the legislature may delegate nonlegislative powers and that the legislature had delegated to the EPA a fact−finding determination. The EPA, which was only to decide on current BPTs, did not usurp law−making powers. The court also held that the legislature could deviate from the federal standards by reviewing DNR rules incorporating those standards, or by changing s. 147.021, 1977 stats. *Id.* at 51−2.

2. Contingent legislation.

A court may also refuse to overturn a statute incorporating later changes of the adopted external material on the ground that the statute's operation is simply contingent upon later external events. Read *Sutherland Stat Const* (6th Ed), Vol. IA, pp. 970−971. In *Niagara of Wis. Paper Corp.*, the court found the operation of s. 147.021 to be contingent upon the EPA's issuance of regulations. *Id.* at 51. See *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 413−15 (1952).

More recently, the court of appeals has upheld a statute incorporating a federal law that had been repealed and recreated since its incorporation into state law. In *Dane County Hospital & Home v. LIRC*, 125 Wis. 2d 308, 323−24 (Ct. App. 1985), the court decided that the applicability of s. 102.61, stats., depends in part on the happening of a contingency: an applicant's eligibility for and receipt of certain federal benefits. The court stated that there had been no unlawful delegation of legislative authority but did not explain its reasoning thoroughly.

The supreme court, in *Krueger v. Department of Revenue*, 124 Wis. 2d 453 (1985), found that the

legislature, in defining "Wisconsin adjusted gross income" to mean the same as adjusted gross income under the federal Internal Revenue Code, intended to apply future interpretations and modifications of the federal definition to the definition in state law.*

In neither *Dane County Hospital & Home* nor *Krueger* was the issue of improper delegation thoroughly briefed or addressed, and the opinions do not fully define unconstitutional delegation. It appears, however, that Wisconsin courts are increasingly willing to uphold statutes adopting federal law, at least.

C. Constitutional Requirement That Laws Be Enacted By Bill.

In *Milwaukee Journal Sentinel v. Wisc. Dep't of Admin.*, 319 Wis. 2d 439 (2009), the supreme court considered the validity of a provision in a collective bargaining agreement that purported to create an exception to the open records law. 2003 Senate Bill 565, which became 2003 Wisconsin Act 319, ratified the collective bargaining agreement in the customary way, by referring to the agreement and requiring the director of the Office of State Employment Relations to file an official copy of the agreement with the secretary of state. The bill contained no reference to the open records exception. The court said that "[i]f a right is given to the public by statute, such as the right to seek disclosure of public records, the legislature may generally take that right away through legislative action in compliance with constitutional mandates," but held that the provision in the collective bargaining agreement was not enacted by bill or published, as required by article IV, section 17 (2), of the constitution. *Id.* at 461. The court rejected the argument that the open records exception was validly incorporated into law by the reference in the bill to the collective bargaining agreement, while recognizing that "under certain circumstances, incorporation by reference may be effective to work a change in the law." *Id.* at 462. The court distinguished the *Wakeen* case, discussed in item B.1. above, noting that in *Wakeen* the statute expressly stated that it was adopting the definitions in the referenced document and that the legislation incorporated a recognized standard, rather than language "being given the force of law." *Milwaukee Journal Sentinel* at 462−463. It is not clear how broadly the court will apply the reasoning in this case.

CONCLUSION AND SUGGESTIONS

In Wisconsin, s. 990.001 (5) (b), stats., specifies as a general rule of statutory construction that any change to an adopted statute is also reflected in an adopting statute. Some commentators have argued that this solution is undesirable because later changes in a statute have unforeseen effects on other statutes. Note: 1950 Wis. L.R. 726, 730; Sentell, 10 Georgia L.R. 153, 154−155 (1975). Use of the cross−reference index and of computer searches can effectively negate this argument, however, by locating all adopting statutes and bringing them to the attention of the legislature. When you change a statute, consider whether each reference should incorporate that change or should specifically adopt only the prior law. If the latter, change the reference to s. XX.XX, 2... stats. Use a similar referent when you insert a reference into a statute that is an exception to the general rule of s. 990.001 (5) (b), stats.; i.e., if the intent is to incorporate no future changes to the adopted statute.

Adopting external material into a statute may lead to constitutional difficulties, particularly if the adopting statute clearly provides that no later changes to the material are adopted.

* The opinion refers to incorporation by reference of future changes in the internal revenue code. However, s. 71.02 (2) (b) 6, 1979 stats., explicitly defined "internal revenue code" to include only those provisions in effect on December 31, 1979. In contrast, see *Cleaver v. Department of Revenue*, 158 Wis. 2d 734 (1990), in which Justice Bablitch wrote the opinion of the court, as in *Krueger*, and in which the court found that future amendments to the Federal Internal Revenue Code did not apply because the statute in question explicitly excluded amendments after December 31, 1976, for the taxable year 1977.

If a requester insists that you write a bill before adopted external material is written or insists that later changes to existing external material be incorporated, try to determine if the request constitutes an unconstitutional delegation; if it may, explain the issue in a drafter's note.

NOTE: See secs. 9.03 and 9.035 (1), *Drafting Manual*, for drafting techniques.